Supreme Court of the United States.

OCTOBER TERM, 1944.

No. 608.

A. H. PHILLIPS, INC.,
Petitioner,

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, DEPARTMENT OF LABOR.

ON CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR PETITIONER.

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Opinions Below.

The opinion of the District Court (R. 11-20) is reported in 50 Fed. Supp. 749. The opinion of the United States Circuit Court of Appeals for the First Circuit (R. 23-30) is reporte din 144 Fed. 2d 102.

Jurisdiction.

A judgment of the Circuit Court of Appeals for the First Circuit, entered in an action brought under section

17 of the Fair Labor Standards Act of 1938 (chapter 676), 52 Stat. 1060; 29 U.S.C. sec. 201 *et seq.*, enjoined the petitioner from violating sections 15(a)1, 15(a)2, and 15(a)5 of the Act (R. 9-11).

Jurisdiction of this Court is invoked under section 240(a) of the Judicial Code. An order allowing certiorari was filed on December 4, 1944 (R. 30).

Statement of the Case.

The facts were stipulated and were adopted by the District Court as findings of fact (R. 11-17) and are summarized as follows:

The petitioner is a Massachusetts corporation having its office at Springfield, Massachusetts. It is engaged in the distribution and sale of grocery items. It operates forty-nine separate retail stores, forty of these in Massachusetts and nine in Connecticut, all within a radius of thirty-five miles of Springfield. The Massachusetts business constitutes eighty-two per cent of the total volume; that of Connecticut eighteen per cent.

The warehouse which serves all of these stores is located at Springfield, Massachusetts. The business office of the company is likewise located in Springfield, which performs all of the usual office work in connection with the entire business, except such sales records as originate in the stores themselves before transmittal to the office.

The petitioner does not engage in manufacturing or other activities not usual to a retail business.

Specification of Errors.

The Court erred in not finding and ruling that the stores, warehouse and office of the petitioner together constitute

a "retail establishment" within the meaning of the exemption in section 13(a)2 of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060; 29 U.S.C. sec. 201 *et seq.*).

Argument.

The stores, warehouse and office of A. H. Phillips, Inc., together constitute a "retail establishment." Its employees are thus exempt under section 13(a)2 of the Fair Labor Standards Act.

Section 13(a)2 of the Act provides as follows: "The provisions of section 6 and 7 [Minimum Wages, Maximum Hours] shall not apply with respect to . . . any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce."

As a general guide in the interpretation of this statute, the statement of Justice Frankfurter in *Kirschbaum Company* v. *Walling*, 316 U.S. 517, 522, is significant: "The history of Congressional legislation regulating not only interstate commerce as such but also activities intertwined with it, justifies the generalization that, when the Federal Government takes over such local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating are reasonably explicit and do not entrust its attainment to that retrospective expansion of meaning which properly deserves the stigma of judicial legislation."

The words "retail establishment" are unambiguous. They afford no difficulty of interpretation. Any confusion as to the meaning of these words results from an interpretation by the Administrator of the Wage and Hour Division as

set forth in Interpretative Bulletin No. 6, issued December 1938, as amended in 1941.

This Bulletin states (paragraph 34): "The term 'establishment' is not synonymous with the words 'business' or 'enterprise' as applied to multi-unit companies. Thus for example, a manufacturing company which has its own retail outlets, operates a number of separate retail and different types of establishments. Each physically separated place of business must be considered a separate establishment and the applicability of the exemption depends upon whether the particular establishment possesses the particular characteristics of a retail or service establishment."

Paragraph 37 states: "The question has been raised as to the scope of the term 'establishment' in the case of chain-store systems, branch stores, groups of independent retailers organized to carry on a business in a manner similar to chain-store systems, and retail or service outlets of large manufacturing or distributing concerns. In the ordinary case, each physically separated unit or branch store will be considered a separate establishment within the meaning of the exemption. The exemption, however, does not apply to warehouses, central executive offices, manufacturing or processing plants or other non-retail selling units which distribute to or serve stores. These are physically separated establishments which do not have the characteristics of retail or service establishments."

While this Interpretative Bulletin issued by one experienced in the administration of the Act is entitled to some weight, it is not in any sense conclusive. As pointed out in *Walling* v. *Wiemann Company*, 138 Fed. 2d 602, 606-607; cert. den. U.S. Sup. Ct. March 13, 1944, the words of the statute are plain and unambiguous. The Administrator is assuming authority to define and delimit these plain and unambiguous words, particularly the word "establishment."

In *Addison* v. *Holly Hill Fruit Products* (decided June 5, 1944), 88 L. Ed. Advance Opinions, 1124, this Court, in discussing the Administrator's powers, stated:

> "The wider a delegation is made by Congress to an administrative agency the more incomplete is a statute and the ampler the scope for filling in, as it is called, its details. But when Congress wants to give wide discretion it uses broad language. Thus, in the Interstate Commerce Act, Congress prohibited a lower rate for a longer than a shorter haul, but it gave an authority to the Interstate Commerce Commission, undefined except as the general purposes of that Act implied the basis for affording exemption, to grant relief from this prohibition. *Intermountain Rate Cases* (*United States* v. *Atchison, T. & S. F. R. Co.*), *234 U.S. 476, 58 L. Ed. 1408, 34 S. Ct. 986.* Again in the National Labor Relations Act, Congress gave the Board authority to take such action 'as will effectuate the policies of this Act.' (*July 5, 1935*) *Sec. 10(c), 49 Stat. 449, 454, c. 372, 29 USCA Sec. 160(c), 9 FCA title 29, Sec. 160(c).* The 'policies' of the Act were so broadly defined by Congress that the determination of 'the relation of remedy to policy is peculiarly a matter for administrative competence.' *Phelps Dodge Corp.* v. *National Labor Relations Bd. 313 US 177, 194, 85 L. Ed. 1271, 1283, 61 S. Ct. 845, 133 ALR 1217.* In the Fair Labor Standards Act, Congress legislated very differently in relation to the problem before us. To be sure the Fair Labor Standards Act like the National Labor Relations Act was based on findings and a declaration of broad policy. But Congress did not prescribe or proscribe generally and then give broad discretion for administrative relief as in the Interstate Commerce Act, or for remedies as in the National Labor Relations Act. Congress did otherwise. It dealt with exemptions in detail and with

particularity, enumerating not less than eleven exempted classes based on different industries, on different occupations within the same industry (the classification in some instances to be defined by the Administrator, in some made by Congress itself, in others subject to definition by other legislation), on size and on areas. In short the Administrator was not left at large. A new national policy was here formulated with exceptions, catalogued with particularity and not left within the broad dispensing power of the Administrator. Exemptions made in such detail preclude their enlargement by implication.

"We should of course be faithful to the meaning of a statute. But after all Congress expresses its meaning by words. If legislative policy is couched in vague language, easily susceptible of one meaning as well as another in the common speech of men, we should not stifle a policy by a pedantic or grudging process of construction. To let general words draw nourishment from their purpose is one thing. To draw on some unexpressed spirit outside the bounds of the normal meaning of words is quite another. For we are here not dealing with the broad terms of the Constitution 'as a continuing instrument of goverment' but with part of a legislative code 'subject to continuous revision with the changing course of events.' *United States* v. *Classic, 313 US 299, 316, 85 L. Ed. 1368, 1378, 61 S. Ct. 1031.*

"Legislation introducing a new system is at best empirical, and not infrequently administration reveals gaps or inadequacies of one sort or another that may call for amendatory legislation. But it is no warrant for extending a statute that experience may disclose that it should have been made more comprehensive. "The natural meaning of words cannot be displaced by reference

to difficulties in administration." *Com.* v. *Grunseit (1943) 67 CLR (Austr) 58, 80.* For the ultimate question is what has Congress commanded, when it has given no clue to its intentions except familiar English words and no hint by the draftsmen of the words that they meant to use them in any but an ordinary sense.

. . .

"The details with which the exemptions in this Act have been made preclude their enlargement by implication. While the judicial function in construing legislation is not a mechanical process from which judgment is excluded, it is nevertheless very different from the legislative function. Construction is not legislation and must avoid 'that retrospective expansion of meaning which properly deserves the stigma of judicial legislation.' *A. B. Kirschbaum Co. v. Walling, 316 US 517, 522, 86 L. Ed. 1638, 1646, 62 S. Ct. 1116.* To blur the distinctive functions of the legislative and judicial processes is not conductive to responsible legislation."

The word "establishment" comprehends within its definition physically separated units of the same business. Webster's International Dictionary, 2d Edition, defines "establishment" as "The place where one is permanently fixed for residence or business; residence, including grounds, furniture, equipage, retinue, etc., with which one is fitted out; also an institution or place of business, with its fixtures and organized staff; as, a large establishment; a manufacturing establishment."

The Supreme Court of Michigan determined that nine separate plants operated by the Chrysler Corporation, and engaged in the manufacture of automobiles and trucks, which were located within a radius of eleven miles of the main plant in Detroit, Michigan, together constituted a single "establishment," since all of these units were syn-

chronized and employed by the corporation in the accomplishment of a common end.

Chrysler Corp. v. *Smith*, 297 Mich. 438; 135 A. L.R. 900.

The Supreme Court of Wisconsin reached the same result in determining that the Nash Kelvinator Corporation's plants in Milwaukee and Kenosha, located forty miles apart, were "just as much a single establishment for the manufacture of automobiles as they would have been had they been in two buildings adjacent to each other."

Spielmann v. *Industrial Commission*, 236 Wis. 240.

In each of the above cases a labor dispute actively in progress in one of the plants occasioned unemployment in the other plants. The question before the Michigan Court and the Wisconsin Court in determining the meaning of the word "establishment" as applied to an organization consisting of various units was almost identical with the question here presented.

The Administrator's definition has been criticized and disregarded in cases involving the interpretation of the Fair Labor Standards Act. The Circuit Court of Appeals for the Seventh Circuit determined that the sixteen separate retail stores and a separate general office and warehouse operated by a Wisconsin corporation in five cities in that state together constituted a retail establishment. This Court pointed out that the words of the statute are plain and unambiguous, and that since the language used is not fairly subject to more than one interpretation, "it cannot be altered in any manner except by Congressional action, certainly not by administrative or judicial legislation."

Walling v. *Wiemann Company, supra.*

The Circuit Court of Appeals for the Sixth Circuit held that a grocery chain operating several hundred stores and several warehouses in Michigan was a retail establishment, under the exemption of 13(a)2 of the Fair Labor Standards Act.

Allessandro v. *Smith Company*, 136 Fed. 2d 75.

The same conclusion was reached in cases before the District Courts. Twenty retail stores and a central warehouse operated by a corporation in Oklahoma were held to constitute a single retail establishment.

Veazey Drug Company v. *Fleming*, 42 Fed. Supp. 689.

See also *Duncan* v. *Montgomery Ward Company*, 42 Fed. Supp. 879.

White v. *Jacobs Drug Store*, 47 Fed. Supp. 298.

Lonas v. *National Linen Service Corp.*, 136 Fed. 2d 433; cert. den. U.S. Sup. Ct. November 8, 1943.

Walling v. *Ward's Cut-Rate Drugs*, March 11, 1944, D.C. N.D. Texas.

The decisions in the above cases were reached only after careful consideration of the words of the statute and with due deference to the interpretation of the Administrator as set forth in Bulletin No. 6. The Courts have consistently pointed out that the language is not fairly subject to more than one interpretation, and that the Administrator's interpretation that the term "retail establishment" does not include a warehouse and office serving physically separated stores of the same business organization is wrong.

The only decision which purports to uphold the Administrator's interpretation as applied to a chain of retail stores and central office and warehouse is found in the case

of *Walling* v. *Goldblatt Brothers*, 128 Fed. 2d 778. That Court reached the conclusion that a corporation which operated three warehouses in Chicago, distributing to ten separate department stores, seven in Chicago, one in Joliet, Illinois, one in Hammond, Indiana, and one in Gary, Indiana, did not come within the exemption of 13(a)2 of the Act. The Court was concerned mainly with the interstate commerce phase of the case and was not directly considering the meaning of the words "retail establishment." The Court used the following language: "Further, we think that such elimination of applicability was intended to include only *ordinary retail stores* . . . and not a great *establishment*, shipping goods out of the state to two of its important outlets." (Emphasis ours.)

It is significant to notice that the Court, when called upon to describe this entire organization, including its stores and warehouses, used the word "establishment." This is its ordinary meaning, as the Court's use of the same indicates.

This case can properly be distinguished on the ground that this "great establishment" engaged in substantial activities not necessary or usual to a retail business, that is, manufacture and processing of food, bakery products, meat compounds, blankets, draperies and other articles.

In fairness to that Court it must be assumed that it had these non-retail activities in mind in distinguishing that business organization as a "great establishment" from an "ordinary retail store." Otherwise the Court is reaching the illogical conclusion that, when Congress uses the word "establishment," it confines the term to the "ordinary retail store," whereas the Court itself uses the word "establishment" to describe the entire business organization. It is apparent that had Congress intended to limit the exemption to an ordinary retail store, it would have manifested such intent by the use of appropriate words.

If the Court did not have the non-retail activities in mind, its words must then be construed to mean that under the exemption of section 13(a)2 a retail establishment is exempt but a great retail establishment is not; that is, that Congress intended to limit the exemption to retailers of a certain size.

To read such an interpretation into two unambiguous words is, in the language of Justice Frankfurter in *Kirschbaum* v. *Walling, supra*, "retrospective expansion of meaning which properly deserves the stigma of judicial legislation."

Whether or not an establishment, great or small, is a "retail establishment" depends, not on the physical location of its units, but on the character of its business. It is a retail establishment if it is engaged in the business of a retailer, as distinguished from that of manufacturer, wholesaler or any other activity.

The Supreme Court has held that the exemption applies to "retailers": "We cannot be unmindful that Congress in enacting this statute plainly indicated its purpose to leave local business to the protection of the states. . . . Moreover as we stated in *Kirschbaum Co.* v. *Walling, supra*, pp. 522-523, Congress did not exercise in this Act the full scope of the commerce power. . . . Since retailers are excluded by reason of these express provisions, it is thought that the inclusion of wholesalers should be implied. . . . It is quite clear that the exemption in § 13 (a) (2) was added to eliminate those retailers located near the state lines and making some interstate sales. . . . And the exemption for retailers contained in § 13 (a) (1) was to allay the fears of those who felt that a retailer purchasing goods from without the state might otherwise be included."

Walling v. *Jacksonville Paper Company*, 317 U.S. 564, 570; 87 L. Ed. 460, 467.

The retail business is fundamentally purchasing goods in large lots and selling them in small lots. The actual sale of the goods, which is the final event in the retail business, is, however, but one of its four necessary functions. The business necessarily entails the purchase and storage of the goods, and the keeping of records of the business transactions.

The simplest illustration of a retail establishment is a corner grocery store, owned and operated entirely by one individual. If this person's business prospers and he hires one or more clerks to assist him, under the terms of the Fair Labor Standards Act, as interpreted by the Administrator, these employees are exempt. If his business expands to the extent that he can add more space and employ more clerks, he is still exempt. However, if at some point in the expansion of his business, he finds it convenient or necessary to rent storage space in a building across the street, the situation suddenly changes. At that point the Administrator determines that these employees in the separate storage space are not exempt, even though the same employees doing exactly the same work were exempt when the storeroom happened to be in the basement or in the back room of the store. Certainly Congress could have had no intention to exempt an employee working in the basement or back room of a store, and not exempt the same employee doing the same work in a room across the street. Such an interpretation by the Administrator is what the Courts have termed administrative legislation.

The Phillips Company, in the operation of its business, engages in no activities different from those of the smallest retail store. Its warehouse and central office function in conjunction with the retail sales outlets in the same manner as such functions are performed by any retail establishment. The sales outlets, the warehouses and office are as much an establishment as if all these activities were confined in one building.

In the District Court opinion, Judge Ford (R. p. 18), cites *Walling* v. *American Stores*, 133 Fed. 2d 840, stating: "That is a case whose facts are sufficiently similar to the present case to justify this Court in deciding it is decisive of the contentions made by the defendant." An analysis of the decision in that case demonstrates that the Circuit Court based its decision on certain activities performed by the American Stores Company which were not of a character usual or necessary to a retail business.

In addition to the usual functions of a retailer, the American Stores Company operated seven bakeries in three states, two canneries in Maryland, purchasing offices in Philadelphia, a coffee roasting plant, a laundry and garment shop, a printing and multigraphing shop, a laboratory and a bottling works, a large food processing and manufacturing plant, all in Philadelphia.

The Phillips Company engages in no activities other than those engaged in by the owner and operator of a single store; namely, buying of goods at wholesale, selling of the same at retail, and the record keeping and storage incidental thereto. There is therefore only a superficial resemblance between the Phillips Company and the American Stores organization.

At the time of Judge Ford's opinion the cases of *Walling* v. *Wiemann Company*, *supra*, and *Walling* v. *Block*, 139 Fed. 2d 268; cert. den. March 1944, had not been decided. The facts in those cases are almost identical with the case here under consideration. Both decisions distinguish the American Stores case, stating that the facts in that case were not analogous.

The decision in the American Stores case is clearly limited, as the opinion states, to a determination that a business organization which, in addition to the usual retail functions, engages in other activities, such as manufactur-

ing and processing, is not properly classed as a retail establishment.

It is significant that the Court did not find that the whole enterprise of the American Stores Company was not an establishment, stating (pp. 842-843): "From the standpoint of business integration, it might conceivably be assumed that this whole enterprise is an 'establishment.' However, it is quite another thing to say that it is a retail establishment when it engages in so many important operations other than retailing, even though the retail selling is the event from which the defendant's income is derived."

See also Note 11, p. 844: "Furthermore, even if the defendant's definition of 'establishment' were accepted, it would by no means follow that the American Stores Company performing the gamut of business operations it does, could properly be classified as a retail establishment."

This case can only be authority for the statement to which the decision is strictly limited; namely, that a "multi-state business structure engaged in the manufacturing and processing of food products, warehousing and distribution of food items to over 2,000 retail stores, is not a retail establishment."

In the American Stores case the Court went to some length in a discussion of the legislative history of the Fair Labor Standards Act. It has long been a settled principle of law that the Court should not resort to the history of proposed legislation or the debates preceding its passage, except to explain language of doubtful import. "Other information than that afforded by the words of the statute can be examined only to aid in the solution of an ambiguity. We can only interpret the words of a statute; we cannot speculate as to the probable intention of the legislature, apart from those words."

Allen v. *Commissioner of Corporations & Taxation*, 272 Mass. 502, 508.

The danger of predicating an opinion from isolated statements before a legislative committee on remarks by certain individuals in respect to the proposed amendments, as recited in the American Stores case, is apparent. There is no way of determining what effects, if any, were made by the reported statements or explanations upon the legislators who later voted on the bill.

The Court in the American Stores case prefaced its remarks concerning the Congressional debates, stating: "What the Congressmen meant by the use of that term 'retailer' is discernible from their questions and comments. Representative Dempsey, prior to the adoption of the amendment, asked whether the bill could 'in any way affect such business as that of the local groceryman, druggist, clothing store . . . operating solely within a state?' Representative Massingale offered an amendment and stated it was 'for the purpose of protecting what you would call the corner grocery store man, or the filling station man'. The House voted down all amendments to achieve this purpose upon the insistence of Representative Norton that the Bill amply covered the problem until Representative Cellar offered his amendment. It exempted 'any retail industry, the greater part of whose sales is in intrastate commerce'. This he argued, indicated 'in the clearest way *that retailing is exempted*'. If it were accepted, 'then retail dry goods, retail butchering, grocers, retail clothing stores, department stores will all be exempt.' The amendment was accepted." (Emphasis ours.)

The Court then points out that in the form finally passed the amendment contains the words "retail establishment" instead of "retail industry" and makes a distinction between the two, whereas it would follow from the Court's argument that Representatives Dempsey, Massingale, Norton, Cellar and all others voting in favor of the bill thought that the terms "retail industry" and "retail establishment" were synonymous.

The recital of the legislative history, and the inference drawn, were not necessary to the Court's decision. Such legislative history was argued to the Court in *Lonas v. National Linen Service Corp., supra*, wherein the Court stated (p. 434): "The exemption section being without ambiguity, we find no occasion to resort to extrinsic aids to construction, though it *may be said in passing that even though we were to consider the legislative history of the section as reviewed by each of the litigants, it would be far from clear that the Congress intended anything other than what it clearly expressed.*" (Emphasis ours.)

The American Stores case overlooks the very obvious fact that no Congressman voting on this legislation was unaware that in every section of the country there are numerous so-called "chain stores." The nature of their effect upon the economic life of the community has been under discussion upon numerous occasions. Their methods of operation and distribution of products are known to everyone. If Congress had intended to exclude these organizations from the exemption, they would have so stated. Clearly they intended the exemption to apply to persons engaged in the retail business, and intended no distinction as to the size or to the location of different units of the business.

The only issue before the Court is the interpretation of the unambiguous words used by Congress in the Fair Labor Standards Act. In all of the cases above cited where the same question of interpretation was directly before the Court, and where the organization claiming exemption, like the petitioner, was engaged solely in the retail business, as distinct from manufacturing or other activities, the Courts have been unanimously of the opinion that the exemption applied, and that the Administrator's interpretation was wrong.

There is a possible qualification to the above statement that in the Block case (*supra*) there was a dissenting opinion by Judge Garrecht (pp. 270-273). This opinion would indicate that the proper approach to a decision is not by way of an interpretation of the words of the statute. While the language is far from clear, it suggests that the application of a remedial statute should be extended and its applicability should be based on economic or moral grounds, rather than on the words of the statute itself.

He states (p. 271): "This case should be considered in its proper 'moral climate'. That moral climate is the public policy that dictated the passage of the statute that we are called upon to construe. . . . Being remedial in its character the Act should be construed 'in accordance with its obvious intent and purpose.'" It is submitted that the obvious intent of an exemption of retail establishments is found in the statute itself and that there is no occasion to explore the "moral climate."

The opinion concluded: "Courts should not be reluctant to apply the salutary and beneficent provisions of the Fair Labor Standards Act whenever this can be accomplished without doing violence to the language of the statute itself. For that law furnishes added proof that the American way is the way of humanitarianism and social betterment."

Such generalities can hardly be said to aid in a determination of what Congress meant by the use of two unambiguous words.

The interpretation that this dissenting opinion suggests, based as it is on the extension of a remedial statute to promote "humanitarianism and social betterment," disregards one important provision of the Act.

Section 16 of the Act provides as follows:

> "Sec. 16. (a) Any person who willfully violates any of the provisions of section 15, shall upon conviction

thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

"(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

This statute, though remedial in nature, also attaches severe criminal penalties. If an individual resists its application to his business which he considers to be a retail establishment, he does so at the peril of imprisonment or a substantial fine.

It is a well-established rule of construction that a statute penal in nature must be construed by giving words their fair meaning in accord with the evident intent of Congress.

United States v. *Raynor*, 302 U.S. 540, 552; 82 L. Ed. 413, 420.

United States v. *Hartwell*, 73 U.S. 385; 18 L. Ed. 830, 832.

Thus the petitioner, though not criminally charged in this action, is entitled to have the words "retail establishment" given their fair or usual meaning. A strained construction, for humanitarian or other reasons, in accordance with the Administrator's interpretation in Bulletin No. 6 would add judicial legislation to the administrative legislation already created.

Conclusion.

The language Congress used in the exemption in section 13(a)2 is plain and unambiguous. The petitioner's business organization is a retail establishment under the terms of the exemption. For the foregoing reasons the petitioner contends that the judgment below should be reversed.

Respectfully submitted,

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